RECORD AND BRIEFS.

No. 16-6795

In the Supreme Court of the United States

CARLOS MANUEL AYESTAS, PETITIONER

v.

LORIE DAVIS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

1. Whether this Court has Article III jurisdiction to review a district judge's denial of investigative funding, under 18 U.S.C. § 3599(f), when such determinations are administrative, non-judicial functions without adversarial proceedings on the issue and can be revised outside the traditional judicial hierarchy.

2.a. Whether it is ever "reasonably necessary," 18 U.S.C. § 3599(f), to grant investigative funding for federal habeas counsel to obtain evidence outside the state-court record regarding trial counsel's performance when that evidence pertains to "an ineffective-assistance-of-counsel claim that state habeas counsel forfeited," Pet. Br. i, and when the federal-habeas court is therefore barred from considering that new evidence under the Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2254(e)(2).

2.b. Whether the Fifth Circuit's "substantial need" formulation of the "reasonably necessary" standard, 18 U.S.C. § 3599(f), is proper for federal-habeas cases, particularly for "an ineffective-assistance-of-counsel claim that state habeas counsel forfeited," Pet. Br. i, when AEDPA and this Court's precedent require an underlying claim to be "substantial" to get further federal-habeas review.

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JURISDICTION

As explained *infra*, Part I, the Court lacks jurisdiction to review the district judge's denial of petitioner's request for investigative funding.

STATEMENT

A. Factual Background, Trial, and Appeal

1. In the summer of 1995, Elin Paneque stopped by his home in Houston for lunch. J.A. 118. He found it ransacked and his 67-year-old mother, Santiaga Paneque, dead in the bathroom, surrounded by blood and vomit. J.A. 119, 128, 353. Duct tape encircled her neck, covered her eyes, and bound her ankles and wrists. J.A. 119. She had been beaten severely, leaving broken bones in her elbow, neck, and face. J.A. 127-28, 354. A medical examination showed that she had been strangled to death, which required someone to squeeze her neck for three to six minutes. J.A. 354.

Petitioner and two others, Federico Zaldivar and Roberto Meza, were arrested for the crime. J.A. 37, 115 n.1, 161. Petitioner was charged with capital murder. J.A. 161.

2. Diana Olvera and Connie Williams represented petitioner in trial court. J.A. 161. Olvera filed a motion to appoint investigator John Castillo to assist with trial preparation. R.1392-93.[1] The trial court granted the motion and authorized payment for the investigative services. R.1394-95.

Castillo's records indicate that he interviewed petitioner several times beginning in February 1996, subpoenaed psychological and disciplinary records, made multiple attempts to contact petitioner's family in Hon-

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[1] R.*p* refers to the record on appeal in the Fifth Circuit.

duras (petitioner's home country), contacted several potential witnesses, searched for criminal histories of inmates who might testify against petitioner, and attempted to obtain deportation records and California prison records for petitioner. R.878-80, 1407-09. Olvera's records indicate that she made multiple phone calls to petitioner's family in Honduras, obtained Harris County jail records documenting infractions by petitioner (fighting and possession of home-made intoxicants), and learned that California had "no disciplinary records" for petitioner. R.874-76.

As found in petitioner's state-habeas proceedings, his trial counsel's efforts to investigate mitigating evidence were hampered by petitioner's refusal to allow contact with his family in Honduras. J.A. 170-71. According to Olvera, she had numerous conversations with petitioner about his family, and he continuously stated that he did not want them contacted. J.A. 149, 170-71. Shortly before trial, petitioner relented, and Olvera and Castillo began reaching out to petitioner's family. J.A. 149-50, 171-72. Castillo sent a letter on May 29, 1997, and Olvera followed up with a letter on June 10. J.A. 149, 171. Olvera also spoke with several of petitioner's family members by phone. On June 25, petitioner's sister indicated that it would be difficult to leave Honduras due to their father's illness and for economic reasons, and, on June 26, petitioner's mother did not appear concerned for her son and seemed evasive in her responses. J.A. 150, 172-73.

Olvera also contacted the Honduran Consulate and informed them of petitioner's situation. J.A. 151, 173. After determining that the Consulate would be unable to assist in securing the presence of petitioner's family at trial, Olvera contacted the American Embassy in Honduras. J.A. 149-51, 173. She faxed a letter to the

embassy on July 2 and attempted to set up a meeting at the embassy for petitioner's family on July 3. J.A. 149-50, 171-72. Ultimately, however, no family member was able to make the trip to Houston for petitioner's trial.

3. The guilt phase of petitioner's trial took place on July 8 and 9, 1997. The prosecution linked petitioner to Paneque's death in several ways.

First, petitioner's fingerprint and palm print were found on the duct tape wrapped around Paneque's ankles. J.A. 121. Petitioner's fingerprints were also found on a roll of duct tape left in the bathroom. J.A. 121.

Second, a neighbor testified that petitioner had been to Paneque's house approximately two weeks before the murder, ostensibly to look at furniture. J.A. 117-18.

Third, petitioner admitted his involvement in the murder approximately two weeks later while he and his accomplices were staying at a home in Louisiana. J.A. 121-22. The homeowner's brother, Henry Nuila, testified that petitioner, while intoxicated, told Nuila that he had killed a woman in Houston and that he wanted to kill his two accomplices because "they had spoken too much." J.A. 122, 163. Petitioner brandished a gun and threatened to kill Nuila if Nuila did not help petitioner kill his accomplices. J.A. 122. Nuila subsequently called the police, who promptly arrested petitioner and his two accomplices.[2] J.A. 122.

In his defense, petitioner's counsel challenged the medical examiner's report of strangulation and the fingerprint identification. *E.g.*, R.4395-98, 4433-42. Coun-

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[2] In the state-habeas proceedings, the prosecutors stated that they also intended to have Zaldivar testify against petitioner. R.5521, 5524. Due to Zaldivar's fear of petitioner, however, they ultimately decided not to call him. R.5521.

sel also questioned the veracity of Nuila's statement, suggesting that his in-court testimony differed from what he told the police on the day of the arrest. R.4189-90. In closing, counsel argued that there was insufficient evidence that petitioner caused or intended to cause Paneque's death. R.4483-86, 4491.

The jury voted unanimously to convict petitioner of capital murder. J.A. 58.

4. During the punishment phase on July 10, 1997, the State established petitioner's ongoing violent propensities. Three days after he murdered Paneque, petitioner forced two victims into a hotel bathroom at gunpoint, threatening to kill them. J.A. 127. Petitioner eventually relented but stole a victim's truck and threatened to kill his family if he went to the police. J.A. 127.

The prosecution also showed that petitioner had a criminal history. One prior conviction was for misdemeanor theft; when petitioner was arrested for that crime, he denied having any health, drug, or alcohol problems. R.4595, 4597, 4608, 5137. Another prior conviction from California was for burglary and a drug-dealing offense, crimes for which petitioner served two years in prison after violating probation from an initially suspended sentence. R.4609. Petitioner was also wanted for illegal transportation of aliens. R.4610, 5199. The prosecution filed a pretrial notice of an intent to present evidence of other extraneous offenses, such as a 1991 drunk-driving incident and several prison infractions, but ultimately did not present those facts to the jury. R.1598-1601.

In mitigation, petitioner's trial counsel presented three letters from a Houston Community College System instructor, stating that petitioner was enrolled in an English-as-a-Second-Language course in the Harris

County jail. J.A. 41-43. The instructor asserted that petitioner was a serious and attentive student. J.A. 41-43.

Petitioner's trial counsel tried to show that he had no criminal history in Honduras using documents that his family had mailed to petitioner and were received by counsel that morning. R.4708-14. But the documents referred to "Denys Humberto Zelaya Corea," R.4709, and only petitioner was in a position to testify that he was known by that name, R.4710; *see* Pet. Br. 10 n.2. The rules of evidence would allow cross-examination of petitioner on any relevant topic if he testified about his history in Honduras, and his counsel did not want to expose him to cross-examination. R.4710-12.

The jury determined that (1) there was a probability that petitioner would commit criminal acts of violence constituting a continuing threat to society; (2) petitioner caused or intended the death of Santiaga Paneque; and (3) there were not sufficient mitigating circumstances to warrant a sentence of only life imprisonment. J.A. 67-69; *see* Tex. Code Crim. Proc. art. 37.071, § 2. The trial court therefore sentenced petitioner to death. J.A. 74-75.

5. Petitioner's counsel for his direct appeal to the Texas Court of Criminal Appeals was Loretta Muldrow. R.1256. She raised eleven arguments, including insufficient evidence at the guilt and punishment stages, the constitutionality of Texas's death-penalty procedures, and objections to evidence at the guilt and punishment stages. R.1256-1316. The Court of Criminal Appeals affirmed the conviction and sentence. J.A. 115-38.

B. State-Habeas Proceedings

1. J. Gary Hart and Robin Norris represented petitioner in his state-habeas proceedings. R.706, 5268.

In 1998, these counsel met with, interviewed, and obtained affidavits from petitioner's mother and two of his sisters who had traveled to Houston from Honduras. R.699; J.A. 85-114. They described petitioner's "stable, middle class background" in which his mother and father had no marital problems and ran a small business in Honduras. J.A. 90-91, 100-101, 110-11. They also stated that petitioner had no major injuries or illnesses, no discernable learning disorders, and no past trouble with the law. J.A. 91-92, 101, 111. Instead, he received above average grades and attended church. J.A. 91-92, 101, 111.

Counsel also filed investigative-funding motions on numerous issues, including alcoholism. R.725-42. State-habeas counsel ultimately hired Tena Francis to conduct an investigation into both guilt and punishment issues. R.702; J.A. 76-84. With respect to punishment, she recommended obtaining a full social history, including information on petitioner's family, character, life experiences, possible mental illness, substance abuse, education, and possible physical and psychological trauma. J.A. 81-82; *see* J.A. 82 (estimating investigation would take 200 hours). Regarding substance abuse, Francis recommended interviewing petitioner and the individuals with whom petitioner was staying in Louisiana around the time of the murder. J.A. 83. Francis assigned the investigation to Gerald Bierbaum, who met with witnesses in Louisiana, various jurors, and petitioner's accomplices. R.700.

On December 9, 1998, eleven months after being appointed, counsel filed a state-habeas petition with ten

ineffective-assistance-of-trial-counsel (trial-IAC) issues and six other constitutional claims. R.5270-73. As relevant here, petitioner raised a trial-IAC claim under *Wiggins v. Smith*, 539 U.S. 510 (2003), arguing insufficient mitigation investigation based on the absence of testimony from petitioner's Honduran family at the punishment stage. R.5294-5301.[3]

In 2003, following *Atkins v. Virginia*, 536 U.S. 304 (2002), state-habeas counsel had a psychologist examine petitioner. J.A. 139-40. The psychologist found that petitioner's IQ was in the "high average range" and that there was "no evidence of mental retardation." J.A. 139-40. He noted, however, some concerns regarding petitioner's "psychological pattern" and that petitioner was "developing some delusional thinking." J.A. 140. Counsel filed the psychologist's findings in state court but redacted the portion about developing mental-health issues. R.5582. This redaction apparently reflected habeas counsel's strategic use of the letter to support an argument that trial counsel should have had petitioner testify in the guilt phase of his trial. R.5558.

2. In 2008, the state district court recommended rejecting all of petitioner's claims, and the Texas Court of Criminal Appeals adopted all relevant findings and conclusions. J.A. 161-200. With respect to trial counsel's failure to obtain the testimony of petitioner's family, the court found that "trial counsel made reasonable, diligent efforts to secure the attendance of the [petitioner]'s family at [petitioner]'s trial, notwithstanding [peti-

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[3] Petitioner wrongly states that federal-habeas counsel was the first to raise a *Wiggins* claim. Pet. Br. 18. State-habeas counsel raised and briefed *Wiggins* in the habeas reply and request for findings of fact and conclusions of law. R.5561, 5719-23, 5767-69.

tioner]'s initial decision not to have his family contacted." J.A. 174. The court ultimately held that trial counsel could not be deemed ineffective for following petitioner's wishes not to contact his family. J.A. 190 (citing *Sonnier v. State*, 913 S.W.2d 511, 522 (Tex. Crim. App. 1995)).

C. Federal-Habeas Proceedings

1. In 2009, after obtaining new counsel, petitioner filed a federal-habeas petition. R.8-67. The petition included a *Wiggins* trial-IAC claim regarding mitigation evidence, five trial-IAC claims regarding the guilt phase, and multiple other constitutional claims. R.8-67.

Petitioner's *Wiggins* claim urged that trial counsel was ineffective by failing to investigate and present evidence of (1) petitioner's good character traits, (2) his kindness and reputation for helping the less fortunate, (3) his lack of criminal history in Honduras, (4) the "bad influence" of his accomplice Zaldivar, and (5) his schizophrenia, alcoholism, and drug use. R.14-15. The first four points were based primarily on the affidavits of petitioner's family that had been obtained by state-habeas counsel and included in the state-habeas record. R.206-09, 282-305. For the fifth point, petitioner referenced his Texas Department of Criminal Justice (TDCJ) prison medical records from 2000 and later. R.28-29. But those medical records were not part of the state-court record and were not filed in any court until after the federal-habeas case was remanded in 2014 (as described below). R.485 n.3.

Sixteen months after filing his federal-habeas petition, petitioner filed a motion under 18 U.S.C. § 3599(f), seeking funding to investigate new mitigation evidence outside the state-court record. R.479-90. Petitioner sought funding for an investigator to travel to Hondu-

ras and interview his family and friends, as well as continue an investigation into his acquaintances in Houston, regarding all of the issues raised in his *Wiggins* trial-IAC claim. R.480.

2. The federal district court denied petitioner's habeas petition. J.A. 237. Regarding petitioner's *Wiggins* claim, the district court concluded that petitioner's substance-abuse and mental-illness allegations were unexhausted and procedurally barred in state court. J.A. 210-15. As to the other *Wiggins* arguments (regarding evidence from his Honduran family), the district court agreed with the state courts that petitioner had not demonstrated deficient performance. J.A. 219-20. The court noted that trial counsel was not ineffective for following petitioner's instructions and acted promptly once petitioner allowed his counsel to contact his family. J.A. 219-20 (citing, inter alia, *Nixon v. Epps*, 405 F.3d 318, 325-26 (5th Cir. 2005), and *Autry v. McKaskle*, 727 F.2d 358, 362 (5th Cir. 1984)).

The court also denied the request for § 3599(f) investigative funding, reasoning that (1) the underlying *Wiggins* claim was meritless because trial counsel had not been ineffective in failing to contact petitioner's family based on petitioner's instructions, and (2) the evidence sought would merely supplement what was already presented to the state-habeas court. J.A. 235-37. The district court denied a certificate of appealability (COA) on all issues. J.A. 233-35.

3. The Fifth Circuit denied petitioner's request for a COA. J.A. 242. Regarding trial counsel's alleged delay in contacting petitioner's Honduran family, the Fifth Circuit applied AEDPA's standard and held that the state court's resolution was "not unreasonable." J.A. 252. The Fifth Circuit also agreed that petitioner did

not show cause for procedurally defaulting his other *Wiggins* trial-IAC claims in state habeas. J.A. 255-56.

4. Petitioner sought certiorari, arguing that *Martinez v. Ryan*, 566 U.S. 1 (2012), allowed him to demonstrate cause for the procedural default of his *Wiggins* trial-IAC claims by showing that state-habeas counsel was ineffective. Shortly thereafter, *Trevino v. Thaler* held that the ineffectiveness of state-habeas counsel can provide cause to overcome a procedural default of a trial-IAC claim under the Texas habeas system. 133 S. Ct. 1911, 1921 (2013). Accordingly, this Court granted certiorari, vacated the Fifth Circuit's judgment, and remanded in light of *Trevino*. J.A. 259. The Fifth Circuit, in turn, remanded the case to the district court for consideration of petitioner's "procedurally defaulted ineffective assistance of counsel claims"—that is, his *Wiggins* trial-IAC claims regarding mental-illness and substance-abuse issues. J.A. 263.

5. On remand, petitioner offered numerous exhibits, many of which were not part of the state record. R.647-881. Petitioner included several affidavits and records from state-habeas investigators Francis and Bierbaum. R.699-704, 714-50, 754-58. Neither noted observing any mental-illness symptoms. R.699-700, 702-04. The only mention of mental illness was in an affidavit created belatedly in 2014, in which Francis stated merely that drug addiction can injure the brain and a "high rate of comorbidity" exists between substance abuse and mental illness. R.704. Similarly, Francis's investigation plan—which is not in the state record and was first introduced in federal habeas—failed to identify any specific evidence that petitioner suffered from a mental illness. R.717-21.

Petitioner's briefing on remand also included updated affidavits from his mother and two sisters. The affi-

davits from his sisters, signed in 2010, are in tension with their earlier descriptions of petitioner's stable background, as these updated affidavits assert that petitioner's father had 22 children with different mothers and had killed a neighbor. R.851-52, 860, 863. None of the new affidavits mention any signs of mental illness, and only one—signed by petitioner's mother in 2014—references alcohol by explaining merely that she suspected petitioner of drinking at age 16. R.870.

For the first time, petitioner referenced an "investigation report" prepared by Castillo (petitioner's trial investigator). R.687-88. The report itself, however, was not introduced into evidence. R.687 n.18 (stating that the report contains extensive confidential work product). According to petitioner, the report states that petitioner sustained several head injuries in the past—one while playing soccer and one from a motorcycle accident—and had headaches. R.687-88. Petitioner contended that the report also stated that petitioner had a head x-ray following a car accident in Houston. R.688. Further, petitioner alleged that the report indicated that petitioner drank frequently, used cocaine, and was using alcohol and cocaine at the time of the murder. R.688. Because the report is not in the record, respondent cannot confirm these statements, explain their context, or fully present argument on whether that information should have triggered further investigation.

Petitioner also, for the first time, filed medical records from his time in prison showing that he had been diagnosed in 2003 as schizophrenic and stating that petitioner had abused alcohol for fourteen years and cocaine for one year. R.770-71; J.A. 141-46. Petitioner also included the unredacted version of the letter from the psychologist who examined him in 2003. J.A. 139-40.

In response, respondent argued that petitioner failed to show that trial counsel or habeas counsel was ineffective. R.892-98. Respondent also argued that AEDPA, 28 U.S.C. § 2254(e)(2), barred the district court from considering any evidence outside the state record. R.904-09.

6. On November 3, 2014—six years after state-habeas proceedings were completed, five years after petitioner filed his federal-habeas petition, and after remand briefing was finished—petitioner filed an ex parte, sealed motion for investigative funding under 18 U.S.C. § 3599(f). J.A. 271-340.

Petitioner sought funding to perform a full social-history investigation supporting his allegation that "trial counsel failed to investigate, in the comprehensive manner required by prevailing professional norms, [petitioner]'s social, medical, and psychological history." J.A. 272; *see* J.A. 277 (stating that federal-habeas counsel sought interviews of "'virtually everyone else who knew the client and his family, including neighbors, teachers, clergy, case workers, doctors,' and so forth.").[4]

7. The district court denied petitioner's federal-habeas petition, ruling that he failed to establish cause

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[4] The investigator whom petitioner sought to hire had already spent two weeks in Honduras and obtained affidavits from 13 individuals, including petitioner's family members. J.A. 301-03. The investigator, however, asserted a need to interview people who knew petitioner in Mexico and California, where petitioner spent significant time. J.A. 307-11. Her list of potential witnesses includes friends, coworkers, a girlfriend, petitioner's son, two drug dealers, and the girlfriends of the drug dealers. J.A. 310-11. Petitioner's counsel anticipated returning to the court, after the social history was compiled, for additional funding for experts to analyze the evidence gathered. J.A. 287.

and prejudice to excuse the procedural default of his *Wiggins* trial-IAC claims regarding mental-illness and substance-abuse issues. J.A. 352. First, the court reasoned that trial counsel had no reason to investigate petitioner's mental health. J.A. 360-61. The evidence that petitioner relied on to show mental illness did not exist until years after his conviction. J.A. 360-61. Next, the district court recognized that state-habeas counsel had retained two investigators who looked into numerous issues and were aware of petitioner's substance abuse. J.A. 361. State-habeas counsel also had petitioner examined by a psychologist. J.A. 361. The court determined that habeas counsel's performance was not deficient. J.A. 361. The court also concluded that, given the brutal nature of the crime and petitioner's substantial history of criminal violence, it was "highly unlikely that evidence of substance abuse would have changed the outcome of the sentencing phase of trial or of the state habeas corpus proceeding." J.A. 361-62.

The district judge also denied petitioner's § 3599(f) investigative-funding request, recognizing that (1) petitioner failed to show trial counsel was deficient, (2) there was no reasonable probability that evidence of substance abuse would have changed the outcome of the state-court proceedings, and (3) state-habeas counsel was not ineffective. J.A. 363.

8. The Fifth Circuit affirmed the denial of § 3599(f) investigative funding. J.A. 390. The court noted its prior statements that funding is available if "the district court finds that there is a 'substantial need' for such services to pursue a claim that is not procedurally barred." J.A. 385. The court also explained that funding requires a "viable constitutional claim, not a meritless one," and that the search cannot be for "evidence that is supplemental to evidence already presented." J.A. 385.

The court noted that there were no medical records indicating that petitioner had a mental illness until 2000 —three years after petitioner's conviction. J.A. 388. The court concluded that it was not ineffective to fail to pursue what appeared to be an unproductive line of inquiry. J.A. 389. The court also stated that it was, "at best ... conceivable, but not substantially likely" that evidence of mental illness would have altered the outcome, and "highly unlikely" that evidence of substance abuse would have altered it either. J.A. 389. The court further held that, because there was no reason to hold that trial counsel was ineffective, there could also be no reason to find state-habeas counsel ineffective for failing to raise these trial-IAC claims. J.A. 390.

Petitioner noted in a rehearing petition that the court incorrectly stated that trial counsel (as opposed to state-habeas counsel) directed a psychological exam. J.A. 399. The court acknowledged the error, concluding that it did not change the court's decision. J.A. 399.

9. This Court granted certiorari limited to the question regarding 18 U.S.C. § 3599(f) investigative funding. J.A. 400.

SUMMARY OF ARGUMENT

I. This Court lacks jurisdiction to review the district judge's denial of investigative funding under 18 U.S.C. § 3599(f) because that denial is an *administrative* function and not an exercise of Article III judicial power. This Court has identified two key hallmarks of administrative acts performed by judges: (1) there is no adversary proceeding on the issue, and (2) the act can be revised outside the traditional Article III judicial hierarchy.

Section 3599(f) funding determinations have both characteristics. These determinations (1) often are made ex parte after a sealed filing with a district judge, as here, and (2) can be revised by either a single circuit judge or the Administrative Office of the United States Courts. Thus, circuit courts considering the question have uniformly held that funding determinations pursuant to the Criminal Justice Act (CJA)—which includes § 3599(f)—are unappealable administrative actions rather than exercises of Article III judicial power. Indeed, judges have advocated placing this benefits-granting duty with other officials.

II. Even if appellate jurisdiction exists, AEDPA bars federal courts, in addressing procedurally defaulted trial-IAC claims, from considering evidence regarding trial counsel's performance outside the state-court record. It cannot be "reasonably necessary," 18 U.S.C. § 3599(f), for federal-habeas counsel to direct an investigation of new evidence of trial-IAC when that evidence cannot be considered by a federal court.

AEDPA generally bars federal-habeas courts from considering evidence not in the record of state-court proceedings. 28 U.S.C. § 2254(e)(2). There are three exclusions from this general rule, but none apply to proce-

durally defaulted trial-IAC claims. First, because such a claim was not raised in state court as required, the prisoner did not diligently attempt "to develop the factual basis of [that trial-IAC] claim in State court proceedings." *Id.* Second, a trial-IAC claim does not rely on a new, retroactive, and previously unavailable "rule of constitutional law." *Id.* Third, defaulted trial-IAC claims do not rest on "a factual predicate that could not have been previously discovered through the exercise of due diligence." *Id.* Only factual predicates that trial counsel *could* have discovered with diligence can underlie defaulted IAC claims.

Martinez v. Ryan did create a narrow equitable exception, as part of this Court's judicially developed rules regarding procedural default, under which state-habeas-IAC can be sufficient cause to allow consideration of an otherwise defaulted trial-IAC claim. However, § 2254(e)(2) is not about consideration of defaulted claims—the "narrow" context addressed in *Martinez*, 566 U.S. at 9—but rather the receipt of new evidence. When Congress directly addresses a situation through legislation like AEDPA, its statute controls. And, for federal courts' consideration of new evidence, Congress in § 2254(e)(2) deliberately "raised the bar" from the prior judicially developed standard. *Williams v. Taylor*, 529 U.S. 420, 433 (2000). This Court has already held that state-habeas counsel's lack of diligence is attributed to the prisoner for purposes of § 2254(e)(2), and statutory *stare decisis* applies to those holdings. *See infra* pp. 35-36 (quoting *Holland v. Jackson*, 542 U.S. 649, 652-53 (2004) (per curiam); *Williams*, 529 U.S. at 437, 439-40). Thus, even when a prisoner invokes *Martinez*'s narrow procedural-default exception, § 2254(e)(2) still bars federal courts from considering

evidence regarding trial counsel's performance that is outside the state-court record.

III. In all events, the Fifth Circuit's "substantial need" formulation properly applies 18 U.S.C. § 3599(f)'s "reasonably necessary" standard for funding in the context of federal-habeas proceedings. Section 3599(f)'s standard must account for the constraints of the underlying proceedings. And AEDPA imposes many significant limits on federal-habeas proceedings. AEDPA and *Martinez* both require an underlying claim to be "substantial" to get further federal-habeas review. And the Fifth Circuit has not applied the "substantial need" formulation outside the habeas context.

Assuming appellate jurisdiction, the Fifth Circuit properly affirmed the denial of § 3599(f) funding. Some aspects of petitioner's motion seek to investigate claims that the courts have already rejected. And, on petitioner's mental-health and substance-abuse *Wiggins* trial-IAC claims, there was no constitutional obligation for trial counsel to perform investigations into either issue given the information trial counsel had at the time of trial. Nor could petitioner show a "substantial likelihood" that the jury would have given him a life sentence rather than the death penalty, given the brutality of the murder, petitioner's commission of a robbery at gunpoint three days later and threat to kill that victim's family if he went to the police, petitioner's admission that he wanted to kill his accomplices, his threat to kill a witness to his confession, and petitioner's criminal history that resulted in jail time after he violated probation.

ARGUMENT

I. The Court Lacks Jurisdiction Because the Denial of 18 U.S.C. § 3599(f) Funding Is Not an Exercise of Article III Judicial Power.

This Court lacks jurisdiction to review the denial of 18 U.S.C. § 3599(f) investigative funding, because such a denial is not an exercise of Article III "judicial Power." Rather, decisions about § 3599(f) funding are *administrative* functions that happen to be performed by judges. Those decisions bear the two key hallmarks of administrative acts, which are not appealable: They do not require adversarial proceedings, and they can be revised outside the Article III judicial hierarchy. The Court should therefore vacate the portion of the court of appeals' ruling regarding § 3599(f) funding and direct that this portion of the appeal be dismissed. *See Lance v. Coffman*, 549 U.S. 437, 439 (2007) (per curiam).

A. Article III jurisdiction does not exist to review the acts of judges performing administrative functions.

Not every act by a federal judge is appealable: "When judges perform administrative functions, their decisions are not subject to [this Court's] review." *Hohn v. United States*, 524 U.S. 236, 245 (1998); *see, e.g.*, *Pope v. United States*, 323 U.S. 1, 13-14 (1944); *Tutun v. United States*, 270 U.S. 568, 576 (1926); *United States v. Ferreira*, 54 U.S. (13 How.) 40, 47 (1851). "Just as trial-related expenditures, reviews, requests, and approvals for funds in the Department of Justice and Federal Public Defender's Offices are administrative, not judicial, functions, so is the CJA . . . process." *United States v. Gonzales*, 150 F.3d 1246, 1254 (10th Cir. 1998); *accord, e.g.*, *In re Boston Herald, Inc.*, 321 F.3d 174,

185 (1st Cir. 2003) (analogizing the CJA to "government benefits programs").

The Court has articulated two key features that distinguish judicial from administrative functions performed by judges. First, judicial acts occur in an adversarial context. Second, judicial acts are not susceptible to revision outside the hierarchical process of judicial review. *See, e.g.*, *Freytag v. Comm'r*, 501 U.S. 868, 891 (1991); *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 754-55 (1976); *Postum Cereal Co. v. Cal. Fig Nut Co.*, 272 U.S. 693, 699 (1927); *Ferreira*, 54 U.S. (13 How.) at 46-47.

1. Administrative acts occur in a nonadversarial context.

A "minimal condition[]" for an act to be considered an exercise of "judicial power" is that the "question" acted on be "presented in an adversary context." *Franks*, 424 U.S. at 754-55; *accord Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1716-17 (2017) (Thomas, J., concurring in the judgment) ("The 'judicial Power' of the United States extends only to . . . issues presented 'in an adversary context.'") (quoting *Flast v. Cohen*, 392 U.S. 83, 95 (1968)). In contrast, deciding in a nonadversarial context whether an individual is entitled to a government benefit is a classic administrative function.

This distinction was recognized early in the Court's history. One example was recounted in *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792), which concerned the Invalid Pensions Act of 1792. In that Act, Congress instructed the circuit courts to review claims for pensions by Revolutionary War veterans. The Reporter's note accompanying *Hayburn's Case* describes the concern of Justices of this Court, then riding circuit, that the duty placed on them as judges exercising judicial power was uncon-

stitutional "[b]ecause the business directed by this act is not of a judicial nature." *Id.* at 411. But Chief Justice Jay and Justice Cushing had a solution: They adjourned court and then "regard[ed] themselves as being ... commissioners designated by the act" and "proceed[ed], as commissioners, to execute the business of this act in the same court room, or chamber." *Id.* at 414; *see also Ferreira*, 54 U.S. (13 How.) at 53.

Furthermore, even if a judge engages in "an inquiry into the existence of facts and the application to them of rules of law," that does not mean the judge is exercising the Article III judicial power. *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 280 (1855). Rather, Article-III adverseness is required. As the Court in *Murray's Lessee* explained:

> [I]t is not sufficient to bring such matters under the judicial power, that they involve the exercise of judgment upon law and fact. It is necessary to go further, and show not only that the adjustment of the balances due from accounting officers may be, but from their nature must be, *controversies* ... within the meaning of the second section of the third article of the constitution.

Id. at 280-81 (emphasis added; internal citation omitted).[5]

The Court's reasoning in *Ferreira* is particularly instructive here. *Ferreira* dismissed an appeal by the

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[5] This is particularly true regarding government benefits provided by statute—like § 3599(f) investigative funding—which are quintessential "public rights." *See, e.g., Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 585-86 (1985). Public rights are often determined outside Article III proceedings. *See Stern v. Marshall*, 564 U.S. 462, 490 (2011); *Murray's Lessee*, 59 U.S. (18 How.) at 284; *Ferreira*, 54 U.S. (13 How.) at 47.

United States from a district judge's disposition of a claim for compensation brought to it under "[t]he treaty of 1819 by which Spain ceded Florida to the United States." 54 U.S. (13 How.) at 45. The Court held that because "all that the judge is required to do, is to receive the claim when the party presents it, and to adjust it upon such evidence as he may have before him, or be able himself to obtain," "such a tribunal is not a judicial one." *Id.* at 46-47. Rather, the "authority conferred on the respective judges was *nothing more than that of a commissioner to adjust certain claims against the United States*; and the office of judges, and their respective jurisdictions, are referred to in the law, merely as a designation of the persons to whom the authority is confided." *Id.* at 47 (emphasis added); *see Hohn*, 524 U.S. at 245.

2. Administrative acts can be revised outside the judicial hierarchy.

In addition to the requirement of an adversary context, a judge does not exercise judicial power if the act can be revised outside the Article III judicial hierarchy.

A judge administering a benefit program does not exercise Article-III power merely by granting preliminary approval that can be overridden outside of judicial "review . . . by superior courts in the Article III hierarchy." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219 (1995). In that scenario, "[i]n the exercise of such function," the district judge "does not enter a judgment binding parties in a case as the term case is used in the third article of the Constitution." *Postum Cereal Co.*, 272 U.S. at 699.

B. Section 3599(f) funding determinations are administrative, non-judicial functions performed by judges.

Section 3599(f) funding determinations are administrative functions performed by judges. These funding requests are often made ex parte, without requiring adversary presentation of the issues,[6] and are subject to revision outside the Article III judicial hierarchy by either a single circuit judge or the Administrative Office of the United States Courts. Circuit courts to consider this issue have uniformly held that decisions on funding requests under the CJA, such as § 3599(f) requests, are unappealable administrative actions.

1. A § 3599(f) funding determination is not made in the context of adversarial presentation of the issues and is not materially different from the nonjudicial action in *Ferreira*. As there, the § 3599(f) funding request here was "altogether *ex parte*," involving only petitioner and the district judge. 54 U.S. (13 How.) at 46; *see* J.A. 271-340.[7] "[A]ll that the judge [was] required to do" under

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[6] Ex parte proceedings are required upon "a proper showing [of] the need for confidentiality." 18 U.S.C. § 3599(f). Courts have interpreted this requirement such that ex parte proceedings are the norm. *See, e.g., Leonard v. Davis*, No. 2:17-cv-00796, 2017 WL 1508244, at *1 (E.D. Cal. Apr. 27, 2017) (stating that "the need for confidentiality is inherent" in such requests); *Haight v. Parker*, No. 3:02-cv-00206, 2010 WL 1489979, at *9 (W.D. Ky. Apr. 13, 2010) (observing that courts generally require, to proceed ex parte, only a "statement ... generically identify[ing] the type of services needed and the broad issue or topic (for example, innocence) for which the services are needed").

[7] In some cases, respondents are permitted to comment on § 3599 funding requests, but that does not make these requests adversarial in the Article III sense. To be adverse, as relevant to the exercise of judicial power, is to have one party "assert a ...

§ 3599(f) was "to receive the claim when the [petitioner] present[ed] it, and to adjust it upon such evidence as he may have before him, or be able himself to obtain." *Ferreira*, 54 U.S. (13 How.) at 46.[8]

Respondent did not have access to any portion of petitioner's funding request until the parties agreed to include a redacted version of that request in the Joint Appendix, for this Court's ease of reference. Portions of petitioner's request still remain hidden from respondent's view. *See* J.A. 271-340. At its core, the dispute here regarding investigative funding is between petitioner and the district judge acting in an administrative role as claim processor—not between petitioner and respondent.

2. A § 3599(f) funding determination is properly deemed administrative because it also may be revised outside the traditional Article III judicial hierarchy.

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right . . . against" another for relief, "or to demand compensation for alleged wrongs," neither of which describe a § 3599 funding proceeding. *Muskrat v. United States*, 219 U.S. 346, 361 (1911) (holding that the United States and the plaintiff were not adverse parties despite their dispute over the constitutionality of a statute). The parties are not "adverse" concerning funding requests, notwithstanding respondents' occasional opposition to them. *See, e.g.*, *Fuller v. Johnson*, 114 F.3d 491, 502 (5th Cir. 1997) (noting that, although the CJA funding proceeding was not ex parte, respondent was still "not a party in interest" to the funding determination).

[8] Notably, under the CJA, "[a] court may choose to have applications for investigative, expert, and other services considered by *a non-presiding judge*." 7 Judicial Conference of the United States, *Guide to Judiciary Policy*, Appendix 2A at 26, https://perma.cc/WR57-ADQS (emphasis added).

A single judge on the circuit court may override a district judge's approval of investigative funding.[9] *See* 18 U.S.C. § 3599(g)(2) (a district judge's approval of funds for investigative services in excess of $7,500, like those requested by petitioner, must be reviewed and ratified by the chief circuit judge or a circuit judge designated by the chief circuit judge); *accord id.* § 3006A(e)(3). That single circuit judge's review is also administrative, based solely on a memorandum from the district judge with no party involvement. *See* 7 Judicial Conference of the United States, *Guide to Judiciary Policy*, Appendix 3A, https://perma.cc/LA9A-V73J (sample request for certification).[10]

Moreover, "the Director [of the Administrative Office of the United States Courts] has occasionally taken

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[9] In *Hohn*, the Court concluded that a single circuit judge's resolution of a request for a certificate of appealability in federal-habeas cases was appealable to this Court. 524 U.S. at 245-46. Central to that conclusion, however, was that such a resolution was "judicial in nature" because "[i]t is typical for both parties to enter appearances and to submit briefs at appropriate times and for the court of appeals to enter a judgment and to issue a mandate at the end of the proceedings." *Id.* at 245. None of those features are present when a single circuit judge reviews a district judge's determination to grant CJA funding.

[10] This process—approval from the chief circuit judge—has been required for various administrative tasks performed by district judges. *See, e.g.*, Pub. L. No. 81-790, 64 Stat. 866, 866 (1950) (assigning temporary bankruptcy referees); Pub. L. No. 74-449, 49 Stat. 1140, 1140 (1936) (hiring law clerks). And like with these other tasks, Congress's provision of limited review was not an accident. Review was provided only for *grants* of funding over a certain amount because Congress was concerned with too *much* spending, not too little. *See* Robert J. Kutak, *The Criminal Justice Act of 1964*, 44 Neb. L. Rev. 703, 723 n.64 (1965) (examining legislative history).

the position that a payment, even one authorized by a chief circuit judge, was prohibited by the terms of the act." *United States v. Hunter*, 385 F. Supp. 358, 362 (D.D.C. 1974); *see also, e.g.*, 18 U.S.C. § 3006A(i) ("Payments . . . shall be made under the supervision of the Director of the Administrative Office of the United States Courts."); *United States v. Gast*, 297 F. Supp. 620, 621-22 (D. Del. 1969) (noting that a Comptroller General's Opinion prevented CJA funding that district judges had approved); *United States v. Naples*, 266 F. Supp. 608, 609 (D.D.C. 1967) (D.C. Circuit Chief Judge Bazelon noting that he "solicited the view of the Judicial Conference Committee to Implement the Criminal Justice Act" while considering whether to approve a request for excess compensation); Subcomm. on Constitutional Rights, S. Comm. on the Judiciary, *The Criminal Justice Act in the Federal District Courts* 213, 90th Cong. (Comm. Print 1968) (detailing Administrative Office rejections of judge-approved funding).

That a district judge's funding determination can be overruled without normal hierarchical review by superior courts indicates that it is an administrative act, not an exercise of judicial power. *See, e.g.*, *Miller v. French*, 530 U.S. 327, 342 (2000) (explaining that the exercise of judicial power is "subject to review *only* by superior *courts* in the Article III hierarchy") (quoting *Plaut*, 514 U.S. at 219) (emphases added); *Freytag*, 501 U.S. at 891 (concluding that the Tax Court's power was "judicial" in part because "decisions of the Tax Court are appealable *only* to the regional United States courts of appeals, with ultimate review in this Court") (emphasis added); *Postum Cereal Co.*, 272 U.S. at 698-99; *Keller v. Potomac Elec. Power Co.*, 261 U.S. 428, 442 (1923); *Ferreira*, 54 U.S. (13 How.) at 47; *Hayburn's Case*, 2 U.S. (2 Dall.) at 414. In fact, if a district judge's funding deter-

mination *were* judicial, then the system of administrative review provided for in the CJA would raise serious constitutional concerns. *See Hohn*, 524 U.S. at 245. The Court "should avoid any such implication." *Id.* at 246.

Additionally, because the CJA allows a chief circuit judge to revoke or revise a grant of funding, allowing an *appeal* of a district judge's determination would create an anomalous result. Petitioners whose funding requests are denied at the outset by a district judge would be able to attack that decision in the circuit court via an appeal under 28 U.S.C. § 1291. Yet those whose requests are granted at first by the district judge but rejected on review by the chief circuit judge have no such recourse, as § 1291 is limited to "decisions of the *district courts*." 28 U.S.C. § 1291 (emphasis added); *see also, e.g.*, *id.* § 1292(a)-(b) (providing for interlocutory review of district-court orders); *United States v. Johnson*, 391 F.3d 946, 949 (8th Cir. 2004) (dismissing appeal of chief judge's funding determination); *United States v. D'Andrea*, 612 F.2d 1386, 1387-88 (7th Cir. 1980) (same). The only way to avoid this anomaly is adherence to the review system provided for in the statute.[11]

3. Consequently, courts considering the question have unanimously held that funding determinations under the CJA—of which 18 U.S.C. § 3599 is a part, *Martel v. Clair*, 565 U.S. 648, 659-60 (2012)—are not judicial acts. Instead, they are exercises of one of the "increas-

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[11] Of course, defendants in federal criminal trials who are unable to obtain funding for services required by due process, *see, e.g.*, *Ake v. Oklahoma*, 470 U.S. 68 (1985), may appeal on that separate, constitutional basis. *See, e.g.*, *United States v. Bah*, 574 F.3d 106, 118-19 (2d Cir. 2009); *United States v. Roman*, 121 F.3d 136, 144 (3d Cir. 1997). No such claim is at issue here.

ing numbers of administrative responsibilities" that "district courts have been assigned," "leading to actions that are not subject to review by appeal." 15A Charles A. Wright et al., *Federal Practice and Procedure* § 3903, at 134 (2d. ed. 1992); *see, e.g.*, *Rojem v. Workman*, 655 F.3d 1199, 1200-02 (10th Cir. 2011) (dismissing an appeal of "the district court's denial of" petitioner's "Ex Parte Motion for Approval of Funding for Expert Assistance"); *United States v. French*, 556 F.3d 1091, 1093 (10th Cir. 2009) (collecting decisions dismissing appeals of other CJA-funding determinations); *cf. Brenner v. Manson*, 383 U.S. 519, 524 (1966) (explaining that while "Congress might confer such 'administrative' tasks upon the" judges of inferior courts, "it could not empower this Court to participate therein").[12]

CJA funding is a benefit "program . . . provid[ing] compensation and expense reimbursement for attorneys appointed to represent individuals with limited financial means in federal criminal [and habeas] proceedings"—a program that "Congress established within the judicial branch" to be "administered" by "the federal judiciary." United States Judicial Conference, *Report of the Committee to Review the Criminal Justice Act* 1 (Jan. 29, 1993), https://perma.cc/6JEB-JRAH. The distribution of public benefits is an administrative act, not a judicial function. In other words, although Congress assigned district judges the task of adjusting claims made under the CJA, administration of this public-benefit program is not consistent with the "common un-

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[12] Contrary to petitioner's contention, Cert. Reply Br. 12, the issue in *Rojem* was identical to this case—the district court denied that petitioner's request for expert funding in advance and in its entirety.

derstanding of what activities are appropriate ... to courts" in exercising the judicial power. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).

In fact, ever since the CJA's enactment, judges have maintained that the task of resolving CJA-funding requests is better suited for other federal officers. *See, e.g.*, *Gonzales*, 150 F.3d at 1255 n.11 ("[T]here is much support for the replacement of judges with an independent administrative board, which would handle the judiciary's present functions in administering the CJA."); *Report of the Committee to Review the Criminal Justice Act*, *supra*, at 9-10, 44-49, 75-80; *see also id.* at 44 ("The need for independence is consistently stressed ... by many judges"); Tr. of Feb. 3, 2016 Mtg. of the Ad Hoc Comm. to Review the CJA at 3, 24 (remarks of Judge Rosemary Peterson) (calling for independent review of requests for non-counsel services), https://perma.cc/B5CJ-NXPY; Tr. of Mar. 2, 2016 Mtg. of the Ad Hoc Comm. to Review the CJA at 8-10 (remarks of Judge Richard Boulware) (similar), https://perma.cc/S2MA-A8AN. This widespread view would be inconceivable if that task were an exercise of the Article III judicial power.

C. Petitioner's arguments for jurisdiction are not persuasive.

In replying to respondent's certiorari-stage briefing raising this jurisdictional issue, Br. in Opp. 27-28, petitioner made three arguments for jurisdiction. None is persuasive.

First, petitioner argued that nothing in 18 U.S.C. § 3599 evinces Congress's intent to "oust[] superior courts of the more general jurisdiction they exercise by way of 28 U.S.C. §§ 1254 & 1291." Cert. Reply Br. 11. This misses the point. The question is whether § 3599

determinations are exercises of Article III judicial power. Appellate courts have never had Article III jurisdiction over non-judicial acts by district judges, and Congress cannot create jurisdiction in this Court over matters that are not judicial in nature. *See Old Colony Trust Co. v. Comm'r*, 279 U.S. 716, 723-24 (1929); *Ferreira*, 54 U.S. (13 How.) at 52; *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803).

Second, petitioner points to this Court's exercise of jurisdiction in appeals concerning the CJA's *counsel-appointment* provisions, *see, e.g.*, *Christeson v. Roper*, 135 S. Ct. 891 (2015) (per curiam); *Martel*, 565 U.S. 648; *Harbison v. Bell*, 556 U.S. 180 (2009), as evidence that this Court has jurisdiction to review CJA *funding* determinations. Cert. Reply Br. 11.[13] But the appointment of counsel is inherently judicial and "has historically rested [with] the judiciary." *Report of the Committee to Review the Criminal Justice Act*, *supra*, at 4. Courts have long held it within their inherent judicial authority to appoint representation for the indigent. *See, e.g.*, *Powell v. State of Ala.*, 287 U.S. 45, 73 (1932) ("Attorneys are officers of the court, and are bound to render service when required by such an appointment."); *United States v. Dillon*, 346 F.2d 633, 636 (9th Cir. 1965) ("Representation of indigents upon court order is an ancient tradition of the legal profession, going as far back as fifteenth-century England and pre-Revolutionary America."). Likewise, pre-CJA Federal

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[13] None of these decisions considered the jurisdictional question presented here, and "[w]hen a potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that no defect existed." *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 144 (2011).

Rule of Criminal Procedure 44 instructed a district court to assign counsel to a defendant who could not afford representation, but there was no "provision for his compensation or for defrayal of expenses incurred." Emanuel Celler, *Federal Legislative Proposals to Supply Paid Counsel to Indigent Persons Accused of Crime*, 45 Minn. L. Rev. 697, 698 (1961).

Moreover, the first congressional foray into the provision of defense services as a government benefit—the District of Columbia Legal Aid Act, Pub. L. No. 86-531, 74 Stat. 229 (1960)—intentionally provided "administrative autonomy . . . free of direct judicial or other governmental supervision," with the goal "of creating an agency that both possesses and appears to possess independence of the judicial and prosecuting arms of [the] government." Francis A. Allen, *Report of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice* 25 (Feb. 25, 1963). In sum, the historical power to appoint counsel for an indigent defendant stands in stark contrast to the provision of government funds for defense and habeas services—particularly funds for investigations that can be carried out by non-lawyers (who are not "officers of the court," *Powell*, 287 U.S. at 73).

Third, petitioner points to § 3599(f)'s reference to "appellate review." Cert. Reply Br. 11. But this reference does not specify the object of appellate review, which is readily understood as the final judgment in the habeas case:

> No ex parte proceeding, communication, or request may be considered pursuant to this section unless a proper showing is made concerning the need for confidentiality. Any such proceeding, communication, or request shall be transcribed

> and *made a part of the record available for appellate review.*

18 U.S.C. § 3599(f) (emphasis added). These two sentences were inserted by AEDPA, Pub. L. No. 104-132, § 108, 110 Stat. 1214, 1226 (1996). They reflect Congress's concern that the ex parte nature of these funding requests to a district judge had "been greatly abused" as "just simply another way of dragging out the process and the proceeding, permitting the [habeas] counsel to argue his case outside the presence of the" government. 141 Cong. Rec. S7813, 7819 (daily ed. June 7, 1995) (statement of Sen. Hatch). Section 3599(f) mentions appellate review without defining its object, and that reference is naturally understood as merits review of the final judgment in the habeas action. After all, something said in the funding proceeding—such as a concession—could be relevant to the merits of the case. Regardless, such an oblique reference could not create Article III jurisdiction to review non-judicial actions taken by district judges. *See, e.g.*, *Lujan*, 504 U.S. at 576; *Old Colony Trust Co.*, 279 U.S. at 723-24; *Marbury*, 5 U.S. (1 Cranch) at 176.

II. For Defaulted Claims of Ineffective Assistance of Counsel, It Is Never "Reasonably Necessary" Under § 3599(f) to Pursue Evidence Regarding Trial Counsel's Performance that Is Outside the State-Court Record, Because AEDPA Bars Its Consideration.

Even if this Court had appellate jurisdiction, AEDPA precludes a federal-habeas court, in adjudicating a state prisoner's procedurally defaulted trial-IAC claim, from considering evidence regarding trial counsel's performance that is outside the state-court record. *See* 28 U.S.C. § 2254(e)(2) (statutory text in the appendix to this brief). It cannot be "reasonably necessary for the representation of the defendant," under 18 U.S.C. § 3599(f), to pursue evidence that cannot be considered by the federal court and thus cannot change the outcome. *See* Br. in Opp. 28-30.

What is "reasonably necessary for the representation" depends on the nature of the proceeding. Although petitioner seeks funding for a federal-habeas challenge, he fails entirely to account for the effect of AEDPA's limitations. Here, 28 U.S.C. § 2254(e)(2) limits the evidence on petitioner's procedurally defaulted trial-IAC claim to only the evidence admitted in state-court proceedings (both trial and habeas). A federal court deciding petitioner's defaulted trial-IAC claim cannot consider any evidence uncovered by the investigation that petitioner seeks to undertake. So it is not "reasonably necessary" under § 3599(f) to fund that investigation.

A. If evidence regarding trial counsel's performance is not in the state-court record, 28 U.S.C. § 2254(e)(2) bars its consideration in deciding a procedurally defaulted ineffective-assistance-of-counsel claim.

1. In AEDPA, Congress chose to limit not only the claims that can be brought in federal habeas, 28 U.S.C. § 2254(a), (b), but also the evidence that can be used to support those claims, *id.* § 2254(d), (e); *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011). Whether investigative funding is "reasonably necessary" under 18 U.S.C. § 3599(f) in a federal-habeas case cannot be judged without accounting for AEDPA's limits.

Petitioner's brief does not address 28 U.S.C. § 2254(e)(2), which "restricts the discretion of federal habeas courts to consider new evidence when deciding claims that were not adjudicated on the merits in state court." *Pinholster*, 563 U.S. at 186 (citing *Williams*, 529 U.S. at 427-29); *accord Schriro v. Landrigan*, 550 U.S. 465, 473 n.1 (2007).[14] This restriction applies whether a petitioner seeks to introduce new evidence through a live evidentiary hearing or written submission. *Holland*, 542 U.S. at 653.

AEDPA's bar on new evidence is triggered if the habeas petitioner "has failed to develop the factual ba-

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[14] Section 2254(e)(2)'s bar on new evidence applies equally to exhausted and unexhausted claims. *See, e.g., Landrigan*, 550 U.S. at 478-79 ("Landrigan failed to develop this claim properly before the Arizona courts, and § 2254(e)(2) therefore barred the District Court from granting an evidentiary hearing on that basis"); *Williams*, 529 U.S. at 437-40 (applying § 2254(e)(2) to prohibit the introduction of evidence that would support an unexhausted *Brady* claim).

sis of a claim in State court proceedings." 28 U.S.C. § 2254(e)(2). That opening clause is met if the prisoner "was at fault for failing to develop the factual bases for his claims in state court," *Bradshaw v. Richey*, 546 U.S. 74, 79 (2005) (per curiam), meaning a "lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." *Williams*, 529 U.S. at 432. Under accepted agency principles, this Court has held that state-habeas counsel's lack of diligence is attributed to the prisoner for § 2254(e)(2) purposes. *See infra* pp. 35-36 (quoting *Holland*, 542 U.S. at 652-53; *Williams*, 529 U.S. at 437, 439-40).

This opening clause thus creates an exclusion from § 2254(e)(2)'s general bar: new evidence can be received where "the prisoner made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court." *Williams*, 529 U.S. at 435. Two more exclusions exist to AEDPA's statutory bar on receiving new evidence: where a claim relies on (1) a new, retroactive, previously unavailable "rule of constitutional law" or (2) "a factual predicate that could not have been previously discovered through the exercise of due diligence." 28 U.S.C. § 2254(e)(2)(A)(i), (ii). For either of those two exclusions to apply, the facts must also show that, but for the alleged error, no reasonable factfinder would have found the prisoner "guilty of the underlying offense." *Id.* § 2254(e)(2)(B).

2. Section 2254(e)(2)'s bar on new evidence regarding trial counsel's performance always applies when a state prisoner presents a procedurally defaulted trial-IAC claim. None of § 2254(e)(2)'s three exclusions can be satisfied in this scenario.

a. The first exclusion cannot apply to procedurally defaulted trial-IAC claims. When a trial-IAC claim is procedurally defaulted because it was not raised by

state-habeas counsel, then there was not a "diligent" attempt, *Williams*, 529 U.S. at 432, "to develop the factual basis of [that trial-IAC] claim in State court proceedings." 28 U.S.C. § 2254(e)(2).[15]

For instance, petitioner asserts that his state-habeas counsel was ineffective in failing to develop evidence of trial counsel's purportedly unreasonable failure to investigate petitioner's substance abuse and mental illness. Pet. Br. 44. That position, if accepted, necessarily means that state-habeas counsel was not diligent in developing the factual basis for this *Wiggins* trial-IAC claim. And this Court has held multiple times, when addressing 28 U.S.C. § 2254(e)(2)'s bar on new evidence, that the "fault" of a "lack of diligence" by state-habeas counsel is attributed to the prisoner, *Williams*, 529 U.S. at 434:

- "Attorney negligence, however, is chargeable to the client and precludes relief unless the conditions of § 2254(e)(2) are satisfied." *Holland*, 542 U.S. at 652-53 (citing *Williams*, 529 U.S. at 439-40).

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[15] If the trial-IAC claim relies on evidence that could not have been discovered during the prior state-habeas proceedings, the claim is unexhausted but *not* defaulted. *See* Tex. Code Crim. Proc. art. 11.071 § 5(a)(1), (e) (allowing a successive petition if the "the factual . . . basis for the claim was unavailable"—that is, "not ascertainable through the exercise of reasonable diligence"—"on the date the applicant filed the previous" petition); *see also Davila v. Davis*, 137 S. Ct. 2058, 2064 & n.1 (2017) (a claim is "procedurally defaulted" when the state court would deny the claim in a successive state-habeas petition "based on an adequate and independent state procedural rule").

- "[State postconviction] [c]ounsel's failure to investigate these references in anything but a cursory manner triggers the opening clause of § 2254(e)(2)." *Williams*, 529 U.S. at 439-40.
- "Federal courts sitting in habeas are not an alternative forum for trying facts and issues which a prisoner made insufficient effort to pursue in state proceedings." *Id.*

b. The second exclusion from the § 2254(e)(2) bar also does not apply in this context. Petitioner has not asserted—and cannot assert—that his *Wiggins* trial-IAC claim relies on a new, retroactive, previously unavilable "rule of constitutional law." 28 U.S.C. § 2254(e)(2)(A)(i). *Wiggins* was decided 14 years ago, and *Washington v. Strickland* recognized trial-IAC claims over 30 years ago, 466 U.S. 668, 687 (1984). Nor can petitoner rely on *Martinez* or *Trevino* to satisfy this exception. Neither establishes a "claim"; rather, they establish a cause to excuse procedural default. *Trevino*, 133 S. Ct. at 1921; *Martinez*, 566 U.S. at 9. Additionally, neither is a new "constitutional" rule of law; those decisions create a mere equitable exception. *Martinez*, 566 U.S. at 13, 16; *see Trevino*, 133 S. Ct. at 1921.

c. Finally, the third exclusion is not met because a procedurally defaulted trial-IAC claim never involves a situation where the claim relies on "a factual predicate that could not have been previously discovered through the exercise of due diligence." 28 U.S.C. § 2254(e)(2)(A)(ii). For trial counsel to have been ineffective by failing to present certain evidence or object to a jury instruction or by some other lapse, the facts that should have prompted trial counsel to act must have been discoverable with due diligence by trial

counsel—and, *a fortiori*, by state-habeas counsel. *See, e.g.*, *Sellers v. Ward*, 135 F.3d 1333, 1343 (10th Cir. 1998).

Petitioner here asserts that his state-habeas counsel procedurally defaulted the *Wiggins* trial-IAC claim, Pet. Br. 52, and that the new evidence he seeks to obtain is "what a proper pre-trial investigation would have unearthed, based on the very red flags that trial counsel ignored," Pet. Br. 45. But that position means that due diligence during state habeas *would* have unearthed this claim's factual predicate, foreclosing resort to the third exception under § 2254(e)(2).[16]

3. Disregarding the § 2254(e)(2) bar would violate not only AEDPA's text but its purpose. Holding that bar inapplicable to defaulted trial-IAC claims would encourage habeas petitioners to sandbag and decline to raise trial-IAC claims in state court so that they get more favorable treatment in federal court. *Cf. Ward v. Stephens*, 777 F.3d 250, 257 n.3 (5th Cir. 2015) ("Ward may have strategically conceded his IAC claim was unexhausted [and defaulted] to obtain de novo review and funding to investigate").

For example, if petitioner had brought his substance-abuse and mental-illness *Wiggins* trial-IAC claims in state-habeas proceedings, AEDPA would re-

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[16] Section 2254(e)(2)'s second and third exclusions also do not apply to trial-IAC claims regarding sentencing, such as *Wiggins* claims, because they cannot show that no reasonable factfinder "would have found the applicant guilty of the underlying *offense*." 28 U.S.C. § 2254(e)(2)(B) (emphasis added); *see In re Webster*, 605 F.3d 256, 258 (5th Cir. 2010) (identical language in 28 U.S.C. § 2255(h)(1) refers to "guilty of the offense," not "'eligible for a death sentence'"); *id.* at 258 n.4 (collecting cases in accord under identical language of 28 U.S.C. § 2244(b)(2)(B)(ii)).

quire deference on federal review to the state court's fact-findings. 28 U.S.C. § 2254(d)(2), (e)(1). And, if petitioner had raised these claims in state court, it would be crystal clear that federal-habeas review would be limited to only the evidence presented in state court. *Pinholster*, 563 U.S. at 181 (citing 28 U.S.C. § 2254(d)(1)). In fact, petitioner *did* raise a *Wiggins* trial-IAC claim on state habeas, arguing a failure to investigate possible mitigation evidence from his Honduran family. R.5294-5301, 5561, 5719-23, 5767-69. If the relevant inquiry is whether the state-habeas court adjudicated any type of *Wiggins* trial-IAC claim—treating a "claim" at a higher level of generality than respondent has to date—then federal-habeas evidence regarding trial counsel's performance would be limited to the state-court record not only under 28 U.S.C. § 2254(e)(2) but also under *Pinholster*'s explication of 28 U.S.C. § 2254(d)(1).

In any event, through AEDPA, Congress intended to channel prisoners' claims first to state courts. "Although state prisoners may sometimes submit new evidence in federal court, AEDPA's statutory scheme is designed to strongly discourage them from doing so." *Pinholster*, 563 U.S. at 186. And even before Congress enacted AEDPA, this Court held that habeas rules should discourage petitioners from presenting new evidence in federal court: "ensuring that full factual development of a claim takes place in state court channels the resolution of the claim to the most appropriate forum." *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 8-10 (1992).

A petitioner who failed to show diligence in state court should not be rewarded with a full evidentiary hearing and de novo review of his defaulted claims in federal court. That is precisely why multiple circuit courts have ruled that § 2254(e)(2) bars the introduction

of new evidence regarding trial-IAC claims that could have, or should have, been pursued earlier. *See, e.g.*, *King v. Westbrooks*, 847 F.3d 788, 799 (6th Cir. 2017); *Williams v. Trammell*, 782 F.3d 1184, 1211 (10th Cir. 2015), *cert. denied sub nom. Williams v. Warrior*, 136 S. Ct. 806 (2016); *Miles v. Ryan*, 713 F.3d 477, 492 (9th Cir. 2013); *Ward v. Hall*, 592 F.3d 1144, 1158-61 (11th Cir. 2010); *Williams v. Norris*, 576 F.3d 850, 862-63 (8th Cir. 2009).

B. *Martinez v. Ryan*'s equitable exception to the procedural-default rule has no bearing on AEDPA's independent bar on consideration of new evidence.

Petitioner has argued that § 2254(e)(2)'s bar on new evidence should be ignored if he shows ineffectiveness of his state-habeas counsel. Cert. Reply Br. 14. But this Court has already held multiple times that state-habeas counsel's lack of diligence is attributed to a prisoner for purposes of § 2254(e)(2). *See supra* pp. 35-36 (quoting *Holland*, 542 U.S. at 652-53; *Williams*, 529 U.S. at 437, 439-40).

To be sure, *Martinez* created a "narrow exception" to the *court-created* rules regarding procedural default; that exception excuses the bar on *considering* defaulted claims if state-habeas counsel was ineffective in pursuing a substantial trial-IAC claim. 566 U.S. at 8. But *Martinez*'s holding necessarily has no bearing on AEDPA's independent bar on what *evidence* federal-habeas courts may consider, for multiple reasons.[17]

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[17] *Martinez* did not create a constitutional right to effective counsel in state-habeas proceedings. 566 U.S. at 13, 16. Petitioner has not asked this Court to overrule precedent and recognize a constitutional right to either effective state-habeas counsel or

First, exempting a prisoner from § 2254(e)(2) based on his state-habeas counsel's ineffectiveness (as *Martinez* did for procedural default of certain claims) would negate the statute. State-habeas counsel's lack of diligence in developing facts is precisely what *triggers* § 2254(e)(2)'s bar. *Williams*, 529 U.S. at 435. Allowing that same lack of diligence to *excuse* the bar would essentially nullify the statutory trigger.[18]

Second, *Martinez*'s "narrow" exception applied only to the rules regarding "procedural default." *Martinez*, 566 U.S. at 8, 17. *Martinez* carefully circumscribed its holding: "The rule of *Coleman*[*v. Thompson*, 501 U.S. 722 (1991),] governs in all but the limited circumstances recognized here." *Id.* at 16. *Martinez* said nothing about the types of evidence that a federal-habeas court could consider and never even cited § 2254(e)(2).

Third, *Martinez* created an "equitable" exception to a judicially developed rule, 566 U.S. at 8, 14, but Congress's directives in federal statutes like AEDPA supersede any judicially developed rules. The rules barring federal consideration of claims defaulted in state court "are elaborated in the exercise of the Court's discretion." *Id.* at 13. In contrast, AEDPA contains

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an evidentiary hearing. Any such request at this stage has been waived and cannot be considered by the Court.

[18] Section 2254(e)(2) would not bar a habeas petitioner invoking *Martinez* from presenting evidence outside the state-court record if that evidence does not concern trial counsel's performance and concerns solely state-habeas counsel's performance (for example, evidence that state-habeas counsel was under the influence of drugs throughout the state-habeas proceedings). Such evidence would not implicate the underlying trial-IAC claim—that is, "the factual basis of [the] claim" that had to be diligently pursued in state court under § 2254(e)(2).

Congress's directives about what evidence a federal-habeas court may consider. When Congress has directly addressed a situation through legislation, those statutes control and supersede any potentially applicable judicially created rules. *See, e.g.*, *City of Milwaukee v. Illinois*, 451 U.S. 304, 313-16 (1981). Indeed, Congress can remove a court's equitable discretion altogether. *See, e.g.*, *Miller*, 530 U.S. at 341.

Before AEDPA, this Court had developed rules outlining what evidence a federal-habeas court could consider in resolving claims undeveloped in state court; this Court chose the cause-and-prejudice standard from the procedural-default context. *Keeney*, 504 U.S. at 6. But Congress, through AEDPA, pointedly eliminated that judicially developed cause-and-prejudice standard for receiving new evidence and replaced it with § 2254(e)(2), which "raised the bar" for federal-habeas petitioners. *Williams*, 529 U.S. at 433.

In interpreting § 2254(e)(2), *Williams* gave effect to what "Congress intended." *Id.* And when AEDPA was enacted in 1996, Congress would have understood—in reliance on this Court's 1991 and 1992 decisions in *Coleman* and *Keeney*, respectively—that any lack of diligence by state-habeas counsel would be attributed to the prisoner under "well-settled principles of agency law." *Coleman*, 501 U.S. at 754; *see Davila*, 137 S. Ct. at 2065. The Court applied *Coleman*'s rule to this very context in *Keeney*, when it refused to allow new evidence based on postconviction "counsel's negligent failure to develop the facts." 504 U.S. at 4; *see id.* at 7-11. When Congress "raised the bar" in AEDPA, *Williams*, 529 U.S. at 433, it could not have intended a weaker rule than the one adopted in *Keeney*. That reality further supports the Court's holding in *Williams* that state-habeas counsel's lack of diligence is attributed to the

prisoner for purposes of § 2254(e)(2). 529 U.S. at 437, 439-40.

Fourth, and relatedly, statutory *stare decisis* applies here: This Court has already held multiple times that state-habeas counsel's lack of diligence is attributed to the prisoner for purposes of § 2254(e)(2). *See supra* pp. 35-36 (quoting *Holland*, 542 U.S. at 652-53; *Williams*, 529 U.S. at 437, 439-40). So this is not a context like *Martinez*, where the Court concluded that its precedent had left open the question whether state-habeas counsel's error could be attributed to the prisoner for purposes of the procedural-default bar at issue there. *See Martinez*, 566 U.S. at 10; *id.* at 15 ("in the 20 years since *Coleman* was decided, we have not held *Coleman* applies in circumstances like this one"). As the Court recently explained, "*stare decisis* carries enhanced force when a decision ... interprets a statute." *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015). Interpreting a statute is precisely what *Holland* and *Williams* did in holding that state-habeas counsel's lack of diligence in pursuing a claim means that the prisoner "failed to develop" that claim's basis in state court, triggering § 2254(e)(2).

Finally, the Court in *Martinez* believed that its holding "ought not to put a significant strain on state resources," 566 U.S. at 15, but that is exactly what will happen if federal-habeas petitioners asserting defaulted trial-IAC claims can begin relying on evidence outside the state-court record regarding trial counsel's performance. Even before Congress enacted AEDPA, this Court explained that "requiring a federal evidentiary hearing solely on the basis of a habeas petitioner's negligent failure to develop facts in state-court proceedings dramatically increases the opportunities to relitigate a conviction." *Keeney*, 504 U.S. at 8-9. And

"[i]t is hardly a good use of scarce judicial resources to duplicate factfinding in federal court merely because a petitioner has negligently failed to take advantage of opportunities in state-court proceedings." *Id.* at 9.

The request here is case in point. Years after state-habeas proceedings concluded, petitioner has asked for funding to perform a comprehensive social-history investigation that includes interviewing "'virtually everyone else who knew the client and his family, including neighbors, teachers, clergy, case workers, doctors,' and so forth." J.A. 277.

If federal-habeas petitioners are now allowed to contravene AEDPA and raise evidence about trial counsel's performance that is outside the state-court record, this will "impose significant systemic costs" on both the Judiciary and the States defending against these claims. *Davila*, 137 S. Ct. at 2068. As the Court recently concluded, "[e]xpanding the narrow exception announced in *Martinez* would unduly aggravate the 'special costs on our federal system' that federal habeas review already imposes." *Id.* at 2070 (quoting *Engle v. Isaac*, 456 U.S. 107, 128 (1982)).[19]

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[19] Petitioner's certiorari-stage briefing cited two post-*Martinez* circuit cases to argue that § 2254(e)(2) does not limit the evidence that federal courts can consider, if *Martinez* is invoked. Cert. Reply Br. 13-15. But *Canales v. Stephens*, 765 F.3d 551, 571 n.2 (5th Cir. 2014), expressly declined to reach the issue. And *Dickens v. Ryan*, 740 F.3d 1302, 1321-22 (9th Cir. 2014) (en banc), failed to give effect to this Court's prior holdings in *Holland* and *Williams* recognizing that state-habeas counsel's lack of diligence is attributed to a prisoner for purposes of § 2254(e)(2). The Court should also reject the Ninth Circuit's holding in *Dickens* for the reasons expressed in dissent there by Judges Callahan, Kozinski, and Bybee. *See id.* at 1328.

III. The Fifth Circuit Uses a Proper Standard for Assessing § 3599(f) Funding Requests in Habeas Cases, and Petitioner's Funding Request Was Properly Denied.

Federal courts lack appellate jurisdiction to review a district judge's denial of § 3599(f) investigative-funding requests. *See supra* Part I. But even assuming such jurisdiction exists, the Fifth Circuit's "substantial need" formulation is a proper description of what satisfies § 3599(f)'s "reasonably necessary" standard *in the context of federal-habeas proceedings*.

A. "Substantial need" is a permissible formulation of § 3599(f)'s standard in habeas cases.

Courts cannot determine what is "reasonably necessary for the representation of the defendant," 18 U.S.C. § 3599(f), apart from considering the context in which the representation is conducted. Here, AEDPA significantly limits federal-habeas proceedings with respect to the claims that prisoners can bring and the evidence that they can use. In light of AEDPA's standards, the Fifth Circuit has correctly described the standard for granting investigative funding on federal habeas as requiring a "substantial need."

1. AEDPA and the Court's precedents impose many limits on federal-habeas review of state convictions, such as:

- A petitioner may raise only constitutional claims. 28 U.S.C. § 2254(a).
- A petitioner cannot obtain relief on a claim adjudicated in state court unless the adjudication was (1) "contrary to, or involved an unreasonable application of, clearly established Federal law," or (2) "based on an unreasonable determination of

the facts in light of the evidence presented in the State court proceeding." *Id.* § 2254(d).

- Courts must presume that all state-court fact-findings are correct, and this presumption can be overcome only by "clear and convincing evidence." *Id.* § 2254(e)(1).
- New evidence is prohibited in many circumstances. *Id.* § 2254(d)(1), (e)(2); *Pinholster*, 563 U.S. at 181.
- An appeal of the denial of habeas relief requires a certificate of appealability, which may only be issued upon "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c).
- Under *Martinez*, a petitioner seeking to excuse procedural default by showing state-habeas IAC must show that his underlying trial-IAC claim is "a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit." 566 U.S. at 14.

When Congress enacted AEDPA in 1996, it included an amendment to § 3599(f)'s predecessor: instead of stating that the judge "shall authorize" a petitioner's attorneys to obtain the reasonably necessary services, subsection (f) now states that the court "may authorize" those services. Pub. L. No. 104-132, 110 Stat. 1214, 1226. Moving from "shall" to "may" indicates a congressional intent to give more discretion to district judges. *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1977 (2016); *United States v. Olano*, 507 U.S. 725, 736-37 (1993) (holding that "may" confers discretion to deny relief even when enumerated requisites are met, "for otherwise the discretion afforded . . . would be illusory," and that this discretion is properly used only in

"serious[]" instances);[20] *see also* 7 *Guide to Judiciary Policy*, *supra*, §§ 660.10.10-.20, https://perma.cc/37L7-USYZ (distinguishing between pre-AEDPA and post-AEDPA requests for investigative services).

2. In light of the standards set by AEDPA and the discretion given to judges in determining when to authorize investigative funding, the Fifth Circuit properly described § 3599(f) as requiring a "substantial need" in the context of federal-habeas proceedings.

In the federal-habeas context, only a "*substantial*" defaulted trial-IAC claim may possibly be considered by federal courts. *Martinez*, 566 U.S. at 17 (emphasis added). And in a federal-habeas case, obtaining a certificate of appealability requires a "*substantial* showing of the denial of a constitutional right," such that "the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (emphasis added; internal quotation marks omitted).

Likewise, the Fifth Circuit's "substantial need" standard for § 3599(f)-funding requests in the federal-habeas context ensures that the investigation "deserve[s] encouragement to proceed further." *Id.* The Seventh Circuit also requires a similar "preliminary showing" before funding may be authorized. *Burris v. Parke*, 130 F.3d 782, 784 (7th Cir. 1997). This does not require petitioner to fully prove success on the merits. *Cf.* Pet. Br. 23.

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[20] Accordingly, the most relief that petitioner could achieve in this appeal, assuming jurisdiction, is a remand for the district judge to exercise his discretion whether to grant even "reasonably necessary" funding.

As petitioner concedes, the Fifth Circuit developed the substantial-need formulation in federal-habeas cases, which are subject to the limits noted above. Pet. Br. 36 (citing *Clark v. Johnson*, 202 F.3d 760, 768 (5th Cir. 2000); *Fuller*, 114 F.3d at 495-96). And the Fifth Circuit has applied this formulation multiple times in situations—like this case—where federal-habeas courts would be barred from considering evidence outside the state-court record. *See Riley v. Dretke*, 362 F.3d 302, 307-08 (5th Cir. 2004); *Fuller*, 114 F.3d at 502.

The Fifth Circuit has also limited the use of the substantial-need formulation to federal-habeas cases. *Brown v. Stephens*, 762 F.3d 454, 459-60 (5th Cir. 2014) (recognizing that federal-habeas cases require substantial need but stating that the court had not yet determined what was necessary in clemency cases). Petitioner has not cited any instance in which the Fifth Circuit used the substantial-need language outside the habeas context.

When the Sixth Circuit rejected the Fifth Circuit's "substantial need" formulation, even the Sixth Circuit expressly recognized that the Fifth Circuit had treated clemency proceedings differently for purposes of § 3599(f). *Matthews v. White*, 807 F.3d 756, 760 (6th Cir. 2015). This Sixth Circuit case itself involved a clemency proceeding—not a habeas proceeding. *Id.* Even then, the Sixth Circuit still required proof of a "substantial question" before granting funds under § 3599(f). *Id.*; *see also Wright v. Angelone*, 151 F.3d 151, 163 (4th Cir. 1998) (same). And the Sixth Circuit recognized that the nature of "the context of federal habeas proceedings" will affect what questions are "substantial" and what testimony might be useful. *Matthews*, 807 F.3d at 760.

The Fifth Circuit did not rewrite the applicable test, *cf.* Pet. Br. 28, but merely applied it in the federal-habeas context presented.

3. Petitioner argues that essentially no analysis of the underlying claim's merits can be conducted in deciding § 3599(f) funding requests. Pet. Br. 28-30. But this ignores that courts routinely, and justifiably, deny § 3599 funding for claims that will not succeed.

The Fifth Circuit has correctly explained that a district judge can deny funding when the petitioner has "(a) failed to supplement his funding request with a viable constitutional claim that is not procedurally barred, or (b) when the sought-after assistance would only support a meritless claim, or (c) when the sought-after assistance would only supplement prior evidence." *Brown*, 762 F.3d at 459; *see* J.A. 385 ("There must be a viable constitutional claim, not a meritless one, and not simply a search for evidence that is supplemental to evidence already presented.").

There is nothing new or unique about recognizing that pursuing meritless claims is not reasonably necessary under § 3599. This Court has ruled that a "court was not required to appoint a new lawyer [under § 3599] just so [habeas petitioner] could file a futile motion." *Martel*, 565 U.S. at 666. In *Landrigan*, this Court held that "the District Court was well within its discretion to determine that, even with the benefit of an evidentiary hearing, Landrigan could not develop a factual record that would entitle him to habeas relief." 550 U.S. at 475; *see id.* at 474 ("[I]f the record... precludes habeas relief, a district court is not required to hold an evidentiary hearing."). Relatedly, in *Rhines v. Weber*, this Court recognized that it would be an abuse of discretion to grant a stay and abeyance (so that petitioner could exhaust his unexhausted claims)

when those claims are "plainly meritless." 544 U.S. 269, 277 (2005).

Multiple circuit courts have similarly affirmed the denial of funding by analyzing the merits of the underlying claims. *See, e.g.*, *Foley v. White*, 835 F.3d 561, 564 (6th Cir. 2016); *Muhammad v. Kelly*, 575 F.3d 359, 375 (4th Cir. 2009) (also citing § 2254(e)(2)); *Riley v. Taylor*, 277 F.3d 261, 314-15 (3d Cir. 2001) (en banc); *Burris*, 130 F.3d at 784-85.

Petitioner argues that the courts below here considered the merits of his claims too early—without allowing him to supplement his arguments with additional investigation and evidence. But § 3599(f) does not guarantee petitioner an evidentiary hearing, and the Court in *Martinez* anticipated that States could end habeas cases by arguing that defaulted trial-IAC claims were "insubstantial." 566 U.S. at 16. It is thus permissible for courts to conduct a preliminary analysis of the merits when reviewing funding determinations.

4. Petitioner's proposed standard for § 3599(f) investigative funding provides effectively no limit. Petitioner argues that funding must be granted whenever a reasonable attorney working with "finite means" would "devote resources" to the services. Pet. Br. 3. The mere existence of "finite" but otherwise unspecified means leaves open whether a reasonable attorney would "devote resources" to (1) investigation of every non-frivolous potential claim or (2) only investigations of claims judged, ex ante, to have substantial merit.

In large part, petitioner argues against the second view, contending that essentially no merits analysis should occur at the funding stage and faulting the Fifth Circuit for assessing the merits too early. Pet. Br. 28-30. But that narrows petitioner's "finite means" test to asking only whether the funding motion would be

"baseless" or "frivolous." Pet. Br. 3, 25. And limiting funding to only those habeas petitions that pass the "frivolous" threshold is no limit at all: The rules of civil procedure *already* prohibit frivolous filings. Fed. R. Civ. P. 11. So § 3599(f)'s standard does no work if it is limited only to frivolous motions.

Nonetheless, petitioner seems to argue that federal-habeas counsel should be allowed to start an entirely new investigation into any potential habeas claim—even if such claims or evidence would be barred by AEDPA. Pet. Br. 24 ("A test that short-circuits the development of claims is at odds with Congress's intent because reasonable attorneys begin client representations by investigating issues, not 'claims' of known merit and viability."). But habeas petitioners are not entitled to funding to undertake fishing expeditions to discover claims that may or may not exist. *See, e.g.*, *Calderon v. U.S. Dist. Ct. for the N. Dist. of Cal.*, 98 F.3d 1102, 1107 (9th Cir. 1996) (denying pre-petition discovery).

At other times, however, petitioner appears to concede that § 3599(f)'s "reasonably necessary" standard requires a habeas petitioner to do *more* than identify a non-frivolous claim. *E.g.*, Pet. Br. 43 (stating that a petitioner must show a "plausible" claim before obtaining funding). But that proves respondent's basic point: the resulting analysis will necessarily require some inquiry into the merits of the underlying claim.

Petitioner also asserts that the phrase "reasonably necessary" had a preexisting meaning that was codified when Congress adopted 21 U.S.C. § 848(q), which later became § 3599. Pet. Br. 31-32. In short, the prior statute referred to "necessary" services, which the circuit courts judged under a standard of reasonableness. Pet. Br. 31-32. This standard, petitioner asserts, requires granting funds whenever the "'underlying facts reason-

ably suggest that further exploration may prove beneficial to the accused in the development of a defense to the charge.'" Pet. Br. 37-38. But petitioner not only ignores that AEDPA changed this law, *see supra* pp. 45-46, he relies solely on *non-habeas* cases. Each of the cases he cites refers to funding for criminal trials, which present different needs, policies, and constitutional requirements—all of which affect whether funding is reasonably necessary. *See, e.g.*, *United States v. Patterson*, 724 F.2d 1128, 1131 (5th Cir. 1984) (per curiam); *United States v. Durant*, 545 F.2d 823, 827-28 (2d Cir. 1976); *United States v. Schultz*, 431 F.2d 907, 911 (8th Cir. 1970). Petitioner's reference to the "private attorney" standard also is supported solely by criminal cases, not habeas cases. Pet. Br. 32.

B. Petitioner's request for investigative funding was properly denied.

There was no error in denying petitioner's request for investigative funding to obtain evidence outside the state-court record in support of his *Wiggins* trial-IAC claims about mental-health and substance-abuse issues.[21] Even if this Court goes beyond the state-court record and considers all of the evidence that petitioner seeks to investigate and introduce in federal habeas, *but see supra* Part II, petitioner has not raised a substantial claim that trial counsel's investigation was constitutionally deficient. As such, state-habeas counsel was not ineffective in failing to raise petitioner's new *Wiggins* claims. Those claims therefore remain barred as procedurally

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[21] Petitioner has not sought § 3599(f) funding to investigate his new claims regarding the Capital Murder Summary Memorandum. J.A. 37-40.

defaulted. As a result, petitioner's funding request—which was made available only in part to respondent and just for the first time after certiorari was granted—does not demonstrate a reasonable need to fund further investigation into a claim that is both meritless and procedurally barred.

1. Petitioner has not raised a substantial claim that trial counsel's mitigation investigation fell below constitutional standards. Petitioner must establish that trial counsel's decision not to further investigate substance-abuse and mental-health issues was unreasonable under prevailing professional norms. *Wiggins*, 539 U.S. at 523. In assessing reasonableness, a court must consider "the quantum of evidence already known to counsel," and "whether the known evidence would lead a reasonable attorney to investigate further." *Id.* at 527. And the Court accords a "'heavy measure of deference'" to counsel's decisions. *Rompilla v. Beard*, 545 U.S. 374, 381 (2005).

If the Court looks solely at the state-court record, as required by 28 U.S.C. § 2254(e)(2), the "quantum of evidence" known to trial counsel regarding petitioner's substance abuse and mental illness is almost nonexistent and would not have triggered further inquiry. Trial counsel was aware merely that petitioner was intoxicated when he confessed to Nuila and may have driven while drunk in 1991. J.A. 122; R.1599. Petitioner himself in 1995 denied having drug, alcohol, or health problems. R.4597, 5137. And the state-court record does not reveal any reason for trial counsel to believe that petitioner had a mental illness.

Even if the Court were to consider new evidence submitted by petitioner on federal habeas, it could not demonstrate that reasonable trial counsel would have been "on notice of the need for [further] investigation."

2 Brian R. Means, *Postconviction Remedies* § 35:6 at 520-21 (2d ed. 2016). As recognized by the courts below, the evidence of petitioner's mental illness post-dates his trial. J.A. 360-61, 388-89 (referring to petitioner's TDCJ medical records from 2000 and later); *see* J.A. 141-46; R.770-71. Petitioner's subsequent diagnosis of schizophrenia does not demonstrate that trial counsel—at the time of trial—should have known that they needed to investigate further.

Petitioner asserts that trial counsel was aware that petitioner had headaches at the time of trial, abused alcohol and cocaine at the time of the murder, and had head injuries in the past. R.687-88. As explained above, *see supra* p. 11, petitioner did not put this evidence into any court record—including the record in this case—so it cannot be considered now by this Court. *See, e.g.*, *New Haven Inclusion Cases*, 399 U.S. 392, 450 n.66 (1970) ("None of this is record evidence, and we do not consider it."). Regardless, it does not prove that a reasonable attorney would have committed significant resources to discovering if petitioner's head injuries caused a mental illness.

Furthermore, presenting evidence of substance abuse and mental illness at trial could have harmed petitioner's case. The prosecutors put on evidence that petitioner in 1995 denied having drug, alcohol, or health problems. R.4597, 5137. Claiming that petitioner had substance-abuse problems would have suggested a propensity to lie, a fact that would not have helped in mitigation. Similarly, including petitioner's jail infractions for "possession of home-made intoxicants" would not have assisted his mitigation defense either. R.874.

The federal-habeas record also includes several affidavits from petitioner's family, R.845-72, some of which were attached to his § 3599(f) motion for funding. J.A.

316-40. But those affidavits do not identify any facts that were proven to be known to trial counsel and, therefore, cannot be used as a basis to judge whether trial counsel's investigation was reasonable.

Petitioner's separate *Wiggins* claim regarding trial counsel's failure to obtain additional evidence from his Honduran family was raised by state-habeas counsel and resolved against petitioner; petitioner has not sought review of that claim in this Court. J.A. 245-52.[22] It would be improper, therefore, to consider any evidence from petitioner's Honduran family members beyond evidence in the state-court record. In fact, *Pinholster*, 563 U.S. at 181, and 28 U.S.C. § 2254(d)(1) separately bar federal courts from considering this new evidence, as this *Wiggins* claim—regarding investigation into evidence from petitioner's Honduran family members—was adjudicated in state court.

But even if this evidence were considered, these affidavits reveal very little. One of petitioner's sisters stated that petitioner had been held for ransom in Mexico. R.862. Another sister stated that, after a trip to the United States, petitioner was "very sensitive," "not the same person as a result of what he suffered on the trip," and "very thin." J.A. 331. And petitioner's uncle noted that petitioner had "changed a bit" and "looked worried and stressed out," which the uncle attributed to homesickness. J.A. 322. Even if trial counsel were aware of

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[22] Regardless, that claim is meritless for the reasons given by the courts below: trial counsel abided by petitioner's instruction not to contact his Honduran family members. *See Landrigan*, 550 U.S. at 475 ("If Landrigan issued such an instruction, counsel's failure to investigate further could not have been prejudicial under *Strickland*.").

this testimony (and there is no evidence they were), it falls far short of establishing a constitutional obligation for counsel to conduct a mitigation investigation into substance abuse or mental health.

The remaining investigation proposed by petitioner, covering witnesses in California and Mexico, does not seek to uncover any additional evidence of what trial counsel knew and whether that knowledge should have caused them to investigate further. J.A. 307-13. Thus, the reasonableness of trial counsel's investigation can be judged on the evidence already in the record, without needing further investigation or § 3599(f) funding. That evidence shows that trial counsel acted reasonably; nothing petitioner sought in his proposed investigation was going to change that.

2. Because trial counsel's investigation did not violate constitutional standards, it was not deficient for state-habeas counsel to decline to raise petitioner's substance abuse and mental illness as support for a *Wiggins* trial-IAC claim. Because state-habeas counsel was not ineffective, this *Wiggins* claim remains barred as procedurally defaulted. The information uncovered by state-habeas counsel, and included in the state-habeas record, actually supports trial counsel's judgment not to investigate further about substance-abuse or mental-health issues. State-habeas counsel learned that petitioner had (1) an above-average IQ, R.5582; (2) no major health injuries or illnesses as a child, J.A. 91, 101, 111; and (3) a stable background and good performance at school, J.A. 90-91, 100-01, 110-11.

Moreover, by the time that state-habeas counsel learned of petitioner's mental illness, that counsel had already argued to the court that trial counsel was ineffective for failing to put petitioner on the stand during the guilt phase. R.5558. Evidence of a developing men-

tal illness would have undercut that argument, so habeas counsel made a reasonable strategic decision.

3. Finally, even assuming deficient performance of trial counsel, petitioner still has not raised a substantial claim of prejudice. This requires a "substantial" likelihood that the jury would have given him a life sentence rather than the death penalty. *Harrington v. Richter*, 562 U.S. 86, 112 (2011). Under Texas's system, then, petitioner must show a substantial likelihood that a juror would have found sufficient mitigating circumstances to warrant a sentence of only life imprisonment. Tex. Code Crim. Proc. art. 37.071, § 2.

The murder of Santiaga Paneque was brutal; her neck was deliberately squeezed for three to six minutes in order to cause her death. J.A. 354. Three days later, petitioner robbed two individuals at gunpoint, threatened to kill them both, and then threatened to kill one victim's family if he went to the police. J.A. 127. Shortly after that, petitioner threatened to kill Nuila if he did not help petitioner kill his accomplices. J.A. 121-22. And petitioner already had convictions for burglary and drug-dealing offenses, which resulted in jail time after he violated probation. R.4608-10.

Against the backdrop of these multiple crimes and significant threats of violence, petitioner posits his substance abuse and the early stages of schizophrenia as mitigation evidence. But courts recognize that such evidence can be aggravating just as often as it can be mitigating. *See, e.g.*, *Cannon v. Gibson*, 259 F.3d 1253, 1277-78 (10th Cir. 2001) (concluding that failure to present evidence of psychiatric disorders as mitigation was not prejudicial and could have strengthened the argument that the defendant was a threat to society); *Waldrop v. Jones*, 77 F.3d 1308, 1313 (11th Cir. 1996) (stating that evidence of excessive drug and alcohol use might have

harmed the mitigation argument). And this is particularly true here, where introducing substance-abuse evidence would have shown that petitioner had lied. *See supra* p. 53.

Given this context, there is not a "substantial" likelihood that the jury would have reached a different result if substance-abuse or mental-health evidence had been submitted. *Harrington*, 562 U.S. at 112. For this reason as well, it was not reasonably necessary to fund any further investigation, under § 3599(f), to pursue such evidence.

CONCLUSION

The Court should vacate the portion of the Fifth Circuit's judgment concerning petitioner's request for funding under 18 U.S.C. § 3599(f) and direct the Fifth Circuit to dismiss that portion of the appeal for lack of jurisdiction. Alternatively, the Court should affirm the judgment of the Fifth Circuit.

Respectfully submitted.

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STATUTORY APPENDIX

STATUTORY APPENDIX

28 U.S.C. § 2254(e):

* * *

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.